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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

5577-348/RSW920010159US1

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on April 28, 2006

Signature 

Typed or printed name Erin A. Campion

Application Number

10/045,556

Filed

January 11, 2002

First Named Inventor

Roy Frank Brabson

Art Unit

2152

Examiner

Chankong, Dohm

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

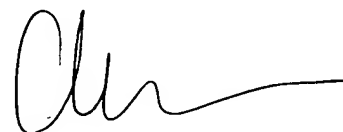
Note: No more than five (5) pages may be provided.

I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)

☒ attorney or agent of record.
Registration number 48,568

☐ attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34 _____



Signature

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Telephone number

April 28, 2006

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☒ *Total of 1 forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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**RESPONSE UNDER 37 C.F.R. § 1.116
EXPEDITED PROCEDURE – EXAMINING GROUP 2152**

Attorney's Docket No. 5577-348/RSW920010159US1

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Brabson *et al.*

Serial No.: 10/045,556

Filed: January 11, 2002

For: **DYNAMIC MODIFICATION OF APPLICATION BEHAVIOR IN RESPONSE
TO CHANGING ENVIRONMENTAL CONDITIONS**

Confirmation No.: 1822

Group Art Unit: 2152

Examiner: Dohm Chankong

Date: April 28, 2006

Mail Stop AF

Commissioner for Patents

P.O. Box 1450

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Erin A. Campion

**REASONS IN SUPPORT OF APPLICANTS' PRE-APPEAL
BRIEF REQUEST FOR REVIEW**

Sir:

This document is submitted in support of the Pre-Appeal Brief Request for Review filed concurrently with a Notice of Appeal in compliance with 37 C.F.R. § 41.31 and with the rules set out in the OG of July 12, 2005 for the New Appeal Brief Conference Pilot Program, which was extended until further notice on January 10, 2006.

No fee or extension of time is believed due for this request. However, if any fee or extension of time for this request is required, Applicants request that this be considered a petition therefore. The Commissioner is hereby authorized to charge any additional fee, which may be required, or credit any refund, to our Deposit Account No. 09-0461.

REMARKS

Applicants hereby request a Pre-Appeal Brief Review (hereinafter "Request") of the claims finally rejected in the Final Office Action mailed December 29, 2005 (hereinafter "Final Action") and the Advisory Action mailed April 17, 2006 (hereinafter "Advisory Action"). The Request is provided herewith in accordance with the rules set out in the OG dated July 12, 2005.

Claims 1-21 and 23 stand rejected under 35 U.S.C. § 102(b) and/or 103 in view of United

States Patent No. 5,280,470 to Buhrke *et al.* (hereinafter "Buhrke"), United States Patent No. 5,835,484 to Yamato *et al.* (hereinafter "Yamato") and/or United States Patent No. 5,983,723 to Nahidipour *et al.* See Final Action, pages 5, 8 and 10. Applicants respectfully submit that many of the recitations of the pending claims are not met by the cited references for at least the reasons discussed herein and in Applicants' previously filed Amendment of October 25, 2005 and Amendment and Request for Reconsideration of March 29, 2006 and that the Office Action of July 25, 2005 (hereinafter "the First Action"), the Final Action and/or the Advisory Action (collectively "the Actions") fail to show that the recitations of the pending claims are anticipated by and/or obvious in view of the cited references. Therefore, Applicants respectfully request review of the present application by an appeal conference prior to the filing of an appeal brief. In the interest of brevity and without waiving the right to argue additional grounds should this Petition be denied, Applicants will only discuss the recitations of the independent Claim 1.

As a preliminary note, Applicants' Amendment After Final of March 29, 2006 was not entered. The recitations added to the claims in this amendment were implicit in the claims and explicit in Applicants' arguments and were only added to expedite allowance of the present application. Accordingly, the pending claims are currently in the form as set out in the Listing of Claims in Applicant's Amendment of October 25, 2005.

Independent Claim 1 recites, in part:

...
determining at a currently-executing application, based on the analysis, whether the currently-executing application should modify a behavior of the currently-executing application.

Claim 23 contains corresponding system recitations. Applicants submit that the cited portions of Claim 1 are neither disclosed nor suggested by the cited references for at least the reasons discussed herein.

The Office Actions point to Buhrke as teaching all of the recitations of Claim 1. See *e.g.*, First Action, page 3. Buhrke discusses a negotiation process between the terminal equipment (TE1 and TE2) and the network switch 4 before a virtual channel is established. See Buhrke, column 5, lines 1 through 14. In other words, the terminal equipment TE1/TE2 sends a request to the switch 4 specifying a minimum quality of service (rate) it can tolerate for the information

to be transmitted. *See* Buhrke, column 5, lines 1 through 10. The switch can either accept the quality of service terms provided by the terminal equipment, reject the quality of service terms provided by the terminal equipment or modify the quality of service terms provided by the terminal equipment. *See* Buhrke, column 5, lines 10 through 14 and lines 20-33. If the switch modifies the quality of service terms, the terminal equipment may either accept or reject the modified terms. If the terminal equipment and the switch reach an agreement, the virtual channel can be established having these minimum agreed upon quality of service terms. Buhrke also discusses modification of the quality of service terms after the virtual channel has been set up. *See* Buhrke, column 5, lines 34-46. This modification is initiated by the switch by requesting a load reduction from the terminal equipment. *See* Buhrke, column 5, lines 37-39.

In contrast, Claim 1 recites "determining *at a currently-executing application*, based on the analysis, whether *the currently-executing application should modify a behavior of the currently-executing application*." Thus, the currently-executing application itself actually determines if a modification is needed and modifies its own behavior. This determination is not made at a switch as discussed in Buhrke. As recited in the specification of the present application the "file or traffic stream is adapted for the current environmental conditions during its (the file or traffic streams) creation -- that is, by the application which originally creates the data." *See* Specification, page 15, lines 9-11. Thus, the currently-executing application of the present application "participates in ensuring that traffic management operates efficiently and effectively." *See* Specification, page 17, lines 9-10. Thus, the teachings of Claim 1 may do away with the need for Buhrke because the "quality of service" may be determined by the application itself without any interaction with a switch. Accordingly, nothing in Buhrke discloses or suggests determining *at a currently-executing application*, based on the analysis, whether *the currently-executing application should modify a behavior of the currently-executing application* as recited in Claim 1 for at least these reasons.

Furthermore, the Final Action states that "Applicant's characterization of Buhrke is not entirely accurate." *See* Final Action, page 2. The Final Action proceeds to explain that "[t]he determination of whether the application should be modified takes place in both the terminal application and the switch..." *See* Final Action, pages 2-3. Applicants respectfully submit that Applicants' characterization of Burke is entirely consistent with the explanation provided in the

Final Action. *See* Applicants' Amendment of October 25, 2005, page 10, first paragraph. As is clear in Applicants' October Amendment, Applicants acknowledge that "both" the switch and the terminal application are involved, however, as also noted therein if **both** the terminal equipment and the switch reach an agreement, the virtual channel can be established having these minimum agreed upon quality of service terms. As further discussed in Applicants' October Amendment, Buhrke also discusses modification of the quality of service terms after the virtual channel has been set up. *See* Buhrke, column 5, lines 34-46. This modification, however, is initiated by the switch by requesting a load reduction from the terminal equipment. *See* Buhrke, column 5, lines 37-39.

In contrast, the currently-executing application of the present application actually determines if a modification is needed and modifies its own behavior. In other words, as stated in the specification of the present invention, "the file or traffic system is adapted for the current environmental conditions during its creation – that is, by the application which originally creates the data." *See* Specification, page 15, lines 9-11. In Burke, the application is not aware of the environmental conditions, it just receives rates from the switch that it may either reject or accept. *See* Final Action, page 3 and Burke, column 5, lines 10 through 14 and lines 20-33.

The Office Actions further point to Yamato as teaching all of the recitations of Claim 1. *See e.g.*, First Action, page 5. Yamato discusses a system including a cell traffic regulation unit that is configured to regulate congestion. In contrast, Claim 1 recites "determining *at a currently-executing application*, based on the analysis, whether *the currently-executing application should modify a behavior of the currently-executing application*." Thus, the currently-executing application actually determines if a modification is needed and modifies its own behavior. This determination is not made at a cell traffic regulation unit as discussed in Yamato. As recited in the specification of the present application the "file or traffic stream is adapted for the current environmental conditions during its (the file or traffic streams) creation -- that is, by the application which originally creates the data." *See* Specification, page 15, lines 9-11. Thus, the currently-executing application of the present application "participates in ensuring that traffic management operates efficiently and effectively." *See* Specification, page 17, lines 9-10. Thus, the teachings of Claim 1 may do away with the need for Yamato's cell traffic regulation unit because the regulation may be done by the application itself without any

interaction with a switch. Accordingly, nothing in Yamato discloses or suggests determining *at a currently-executing application*, based on the analysis, whether *the currently-executing application should modify a behavior of the currently-executing application* as recited in Claim 1 for at least these reasons.

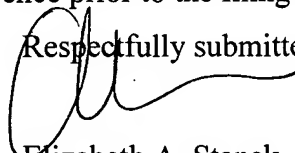
Furthermore, the Final Action states that the "cell traffic regulation unit" corresponds to the currently-executing application." *See* Final Action, page 4. Applicants respectfully submit that the cell traffic regulation unit of Yamato cannot be the currently-executing application as recited in Claim 1. In particular, Yamato states:

The cell traffic regulation unit 200 has a regulation unit 201 for monitoring the cell flowing into the node system 112 through a connection 121, a control unit 202 for controlling the regulation unit 201 to regulate the cell flow on the connection 121, and a congestion detection unit 203 for detecting the occurrence of the congestion in the node system 112 by monitoring the cell flowing out from the node system 112 through a connection 122. This cell traffic regulation unit 200 is to be attached at any connection in the ATM network for which the monitoring is desired.

See Yamato, column 5, lines 53-62. Thus, the cell traffic regulation unit of Yamato does just that, it regulates/monitors traffic sent between applications, but is not a currently-executing application as recited in Claim 1. Thus, the claims of the present application are patentable over Yamato for at least these additional reasons.

Accordingly, for at least the reasons discussed above, many of the recitations of independent Claims 1 and 23 and the claims that depend therefrom are not met by the Buhrke and/or Yamato. Therefore, Applicants respectfully request that the present application be reviewed and reversed by the appeal conference prior to the filing of an appeal brief.

Respectfully submitted,


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